

**Alaska Center for the Environment • Alaska Community Action on Toxics
Alaska Wildlife Alliance • Coast Alliance • Cook Inlet Keeper
Center for Marine Conservation • Kachemak Bay Conservation Society
Kodiak Audubon Society • National Wildlife Federation
Sitka Conservation Society • Southeast Alaska Conservation Council
Wildlife Federation of Alaska**

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P.O. Box 110030
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Dear Mr. Galvin:

I. Introduction

Our groups represent more than 14,000 Alaskans concerned about the proper management and protection of Alaska's magnificent coastal resources. Please accept these comments on the Division of Governmental Coordination's (DGC) proposed consistency rules (6 AAC 50 et seq.) under the Alaska Coastal Management Program (ACMP) and the federal Coastal Zone Management Act (CZMA). While we commend DGC's efforts to revise the consistency rules, we believe for the reasons stated herein that portions of the proposed rules violate state and federal law and policy. As a result, we request changes to the proposed rules consistent with these comments.

II. Comments

A. Definitions

1. The proposed rule correctly defines "activity" as any "land or water use that may affect any coastal use or resource." 50.990(a)(2). However, to comply with congressional intent, federal law and policy, and the ACMP, the definition should clarify that "activities" include "direct effects on coastal uses and resources which result from the activity and occur at the same time and place as

the activity, and indirect (i.e. cumulative and secondary) effects which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.” See, e.g., 15 CFR 930.11(g).

2. The proposed rules do not define the term “director-level consistency determination”, and should do so to clarify the meaning and intent of this phrase.

3. The definition of “alternative measure” is cumbersome. DGC should retain the current term “stipulation” to avoid confusion. For example, in a single agency review, the agency would apply its agency “conditions” and the ACMP-related “stipulations.” In a multi-agency DGC coordinated ACMP review, DGC would apply the “stipulations.”

4. Proposed 6 AAC 50.990(9) & (11) should include “geophysical” as an element of coastal resources. Similarly, 6 AAC 50.990(9) should include the terms “land,” “gravel”, “water” and “sand” as coastal resources.

5. Proposed 6 AAC 50.990(13) presumes consistency, and as a result, should be reworded so that a “consistency certification” means a declaration that is supported by the necessary data and information by an applicant OF WHETHER ~~that~~ a proposed project complies with the ACMP and that the project will be conducted in a manner consistent with the program.”

6. Proposed 6 AAC 50.990(19) regarding cumulative impacts inappropriately determines that the incremental impacts (cumulative impacts) must be “considerable.” This language is inconsistent with the CZMA, the ACMP, and the ACMP FEIS, as well as numerous DGC/OCRM grants obtained over the past several years. As a result, this section should be modified to include “any reasonably foreseeable effects to coastal uses and resources,” and should also include reference to any foreseeable coastal activities or projects.

7. The proposed definition of “authorization” in 6 AAC 50.990(8) unduly ties the definition to “federal authorization” found in 15 CFR 930 et seq. As a result, the last sentence of the proposed rule should be deleted, or should be amended to include “and includes” prior to the last sentence. Otherwise, the ACMP will not apply to state-level authorizations, which would make it contrary to the CZMA. Furthermore, failure to amend this section will mean that 6 AAC 50.005(a)(1) and 50.005(a)(3) would be duplicative.

B. ACMP Applicability

1. Proposed 6 AAC 50.005 applies ACMP review to projects which “may affect any coastal use or resource,” and commentors support DGC’s efforts to include the full range of coastal impacts within ACMP review. In order to bring the ACMP in line with the CZMA, however, DGC should clarify the term “may

affect”, to include “reasonably foreseeable effects” on coastal uses and resources. See 15 CFR § 930.11(b). Furthermore, because “(e)ffects include both direct effects which result from the activity and occur at the same time and place as the activity, and indirect (cumulative and secondary) effects which result from the activity and are later in time or farther removed in distance, but still reasonably foreseeable,” 15 CFR § 930.11(g), the inclusion of cumulative effects should accompany any reference to the phrase “may affect.”

2. In amending the CZMA in 1990, Congress expressly overturned the Supreme Court decision in *Secretary of Interior v. California*, and this expression of congressional intent is reflected in 15 CFR § Subparts C & E. As a result, 6 AAC 50.005 must be amended to provide consistency reviews and public participation for federal Outer Continental Shelf (OCS) oil and gas lease sales.

3. Similarly, and in compliance with CZMA rules, 6 AAC 50.005 must be changed to provide consistency reviews and public participation for Department of Interior 5 Year OCS Plans, unless the Secretary of Interior issues a negative determination for such plans.

4. State of Alaska Areawide Oil & Gas Lease Sales result in the divestment of public resources which require an approval from the Department of Natural Resources that the sale is in the best interests of the citizens of the State. As a result, DGC should clarify that proposed 6 AAC 50.005 & 50.990(8) include such reviews.

C. Transitional Provisions

1. The latest version of the proposed consistency rules (i.e. draft_DGC_11) contain 6 AAC 50.015 relating to transitional provisions. This section is incomplete and unintelligible in the draft proposal, and as a result, should be removed or clarified, with opportunity for public comment on this section if DGC adds additional language.

D. Project Scope

1. As noted in comments A.1 & B.1 above, and as discussed in 15 CFR § 930 et. seq., the scope of consistency review cannot be constrained simply to the scope of the project. Instead, the scope of consistency review must include reasonably foreseeable direct and indirect (cumulative and secondary) effects to coastal uses and resources. Therefore, to comply with the CZMA, proposed 6 AAC 50.025(b) must be amended to include such reasonably foreseeable effects on coastal uses and resources.

2. Proposed 6 AAC 50.230 is duplicative (see §§ 50.025 and 50.700), and as a result, it should be deleted.

3. In order to fulfill the intent of the CZMA to foster local input and control over local decisions, proposed 6 AAC 50.025(a) should be amended to require a coordinating agency to consult with a coastal district with an approved DCMP

concerning the scope of the project. Previous section 6 AAC 50.040 mandated that DGC and all resource agencies regularly inform each coastal resource district of proposed projects which may have impacts on that district, and this practice should be continued.

E. DGC Coordination Responsibility

1. The proposed rules empower DGC to facilitate single agency reviews under the ACMP, 6 AAC 50.035(e), and to “ensure that the agency is coordinating reviews in the manner provided” under the ACMP. Id. at 50.035(f). One of the central problems with single agency review is the disparate public notice mechanisms used by different state and federal agencies. For example, different agencies use different forms of notice (e.g., newspaper versus individual notice), and rely on different mailing or email lists to provide such notice. In order to maximize DGC’s facilitation role, and to meet the public participation mandates of the CZMA, 15 CFR § 930.2, DGC should ensure that all citizens expressing an interest in activities in specified coastal districts receive notice of such activities during single agency reviews.

2. Proposed 6 AAC 50.035 and 6 AAC 50.205 contain several duplicative provisions, and these sections should be combined to clarify the respective roles of DGC and other agencies in the consistency review process.

3. Proposed 6 AAC 50.035(b) appears to prohibit the public or a coastal district from commenting on a consistency certification for a federal project. This is contrary to the federal regulations and to the ACMP FEIS. To comply with the CZMA, the state agency must provide an opportunity to comment on the certification. The public and coastal districts are entitled to comment on both the certification and any appeal to OCRM. See 15 C.F.R. §§ 930.6, 930.42 & 930.128(b), and that opportunity should be highlighted in this regulation.

F. Coastal Resource District Responsibility

1. To comply with the intent of the CZMA, and to foster local input and control on local resource decisions, proposed 6 AAC 50.055 should be amended to allow coastal districts to recommend alternative measures (i.e. stipulations) during the ACMP review for agency consideration in the final consistency determination. While this does not obligate the agency to accept these recommendations, it does recognize the district’s option to submit the recommended alternative measure, even if the district doesn’t have Title 29 authority.

G. Resource Agency Authority

1. In addition to proposed 6 AAC 50.275(a), and to comply with the CZMA, proposed 6 AAC 50.045 should say no agency should be able permit, authorize or otherwise allow an activity coordinated under the ACMP until DGC or the reviewing agency has issued a final consistency determination.

2. Proposed 6 AAC 50. 275(g) is contrary to the CZMA and the ACMP and undermines coordinated reviews, because an agency may simply change an

ACMP requirement in its own administrative appeal process. This section impermissibly allows a *post hoc* agency amendment to the project that eviscerates the prior public and agency ACMP review. An applicant that is dissatisfied with an ACMP “alternative measure” simply has to appeal to a resource agency, and that agency can change the “alternative measure” with no resource agency or public review. As a result, this section must be amended to protect the public and agency review procedures required by the CZMA.

H. Application & Coordination of Consistency Reviews

1. Proposed 6 AAC 50.200 applies the consistency review process to activities which “will likely” affect a coastal use or resource. However, this language conflicts with the language in 6 AAC 50.005, which applies ACMP jurisdiction to activities which “may affect” such uses and resources. In order to clarify the scope of ACMP jurisdiction over projects in the coastal zone, and to comport with the intent, rules and guidance of the CZMA, DGC should clarify this section to ensure that any activity which may affect coastal uses or resources (and which requires a relevant agency permit, license or authorization) will undergo ACMP consistency review.
2. Proposed 6 AAC 50.205(c) allows an agency review to substitute for an ACMP review, but does not incorporate the same comment periods as required in the ACMP. For example, the cross reference to 6 AAC 50.500-.520 does not include time periods. To correct this, language should be added that requires that if 6 AAC 50.205(c) is used, then the ACMP timeline detailed in 6 AAC 50.235 applies.

I. Coastal Project Questionnaire

1. Proposed 6 AAC 50.210(e) discusses scenarios where a CPQ is not required, and for the reasons cited in Section S below, this provision must be modified to comply with the CZMA, the ACMP and the habitat standard.
2. Coastal Policy Questionnaire’s submitted to DGC and other agencies often contain misstatements and errors which can seriously affect ACMP coordination and implementation. To address this problem, 6 AAC 50.225 should require CPQs to prominently state in the applicant signature section that erroneous statements on the CPQ will result in civil penalties, including fines and the rejection of an ACMP application, if such false statements were made knowingly. This section should be further modified to specifically state a completed CPQ means a CPQ in which all relevant information has been submitted accurately.
3. Pursuant to 15 CFR § 930.58, the CPQ must also contain a discussion about the effects on coastal uses and resources from a proposed activity, including direct and indirect (i.e. cumulative and secondary) effects.
4. Proposed 6 AAC 50.210(c)(3) changes the current practice of requiring CPQs for all projects, regardless of whether they are on the A or B list. It is impor-

tant for the public to have an ability to review the project CPQ to ascertain whether it is properly being deemed an A or B list project. The CPQ performs that function, and should be required for all projects.

J. Pre-Review Assistance, Consistency Review Packet & Timing

1. Proposed 6 AAC 50.216(c) lists numerous points of information which DGC may provide an applicant prior to submission of a CPQ. Similar to other provisions in the proposed rules, however, this section emphasizes the project and the process, and not on the coastal uses and resources which may be affected. This bias should be corrected by referencing coastal uses and resources which maybe affected by a potential activity in 6 AC 50.216(c).

2. Proposed 6 AAC 50.216(e) states that DGC and resource agencies “will attempt to inform a coastal resource district of a proposed project that may affect a coastal use or resource within the district.” This language undermines the local participation and decision making intents of the CZMA, and should be amended to require such information be provided to the district, a resource agency or the public, if requested by such entities, as part of the pre-application process.

3. Proposed 6 AAC 50.220 should require the applicant to identify, with specificity, the applicable district policies and ACMP enforceable policies with which the project complies. If the public is held to a standard of identifying each coastal district standard in the public comments, the applicant must at least, be held to that same standard in the application. Otherwise, the general public will be unable to ascertain, from a general assertion (as identified in 6 AAC 50.220(a)(1)(B)), that the project is generally “consistent with the enforceable policies”. The CZMA requires public notice sufficient to promote comments on the proposal, and without enumeration of the standards against which the project will be measured (or which the applicant asserts ACMP compliance), the public will be without a reasonable basis on which to direct comments. As a result, this section should be amended so that when a project applicant contends that a project is consistent with an enforceable policy, the project applicant must identify the enforceable policy and explain how the project is consistent with the policy. This is the only method that will provide the public with the necessary information to ascertain the nature of the project, and its consistency with the ACMP. See 15 CFR § 930.61(b)(2).

4. Proposed 6 AAC 50.235 contains no standards or ability for the public to have input on the agency determination that “the project is likely to have minimal impact on coastal uses and resources.” In a single agency review, the agency will have unfettered discretion to make this determination of “minimal impact,” with no ability for the public to affect or weigh-in on that decision. The agency will have pre-determined the outcome of the ACMP review, and there will be little ability to change that decision. This section of the proposed regulation conflicts with the CZMA and should be eliminated in its entirety.

K. Initiation of Review

1. In order to ensure interested citizens have an opportunity to participate meaningfully in the state ACMP reviews, and to comply with CZMA rules regarding public participation, the proposed rules should be amended to replace the phrase “or” with “and” at the end of 6 AAC 50.240(d)(2). Otherwise, interested citizens will be at a significant disadvantage to comment on activities affecting coastal uses and resources, particularly during 30 day review schedules. Similarly, to ensure compliance with the CZMA, the phrase “or” should be replaced with “and” at the end of 6 AAC 50.240(d)(3)(A), to ensure copies of ACMP materials are available in any coastal district potentially affected by coastal activity. Otherwise, the proposed rule would allow DGC, for example, to make ACMP materials available only in Anchorage for a project on the Kenai Peninsula.
2. For the reasons cited in J.1 above, the same changes should be made to proposed 6 AAC 50.335 for federal consistency reviews, i.e. “or” should be changed to “and” at the end of 50.335(2)(C) and at the end of 50.335(2)(D)(i). (technical note: To promote readability and technical consistency, DGC should use consistent alphanumeric citations throughout the rules; for example, this section begins with a number (i.e. (1)), while other sections begin with letters (i.e. (a)).
3. For the reasons cited in J.1 above, the same changes should be made to proposed 6 AAC 50.435, i.e. “or” should be changed to “and” at the end of 50.435(2)(C) and at the end of 50.435(2)(D)(i).

L. Request for Additional Information

1. As currently proposed, citizens have no means to request additional information on a proposed project. To ensure meaningful public participation in the ACMP and to comply with the CZMA, 6 AAC 50.245 should be amended to afford citizens the same rights to request additional information as other reviewers. At a minimum, citizens should have the opportunity to request additional information from the reviewing agency, and if the reviewing agency finds such information material and relevant to the activity and associated effects to coastal uses and resources, the agency shall request such information from the applicant.
2. For the reasons cited above, 6 AAC 50.345 & 50.445 should be modified to allow citizens the same opportunities as other reviewers, i.e. to request additional information from DGC and/or the reviewing agency in the process of reviewing federal consistency determinations and authorizations.
3. If an agency has already determined that a project has “minimal impact” in the 30-day review, it is unclear on what basis that agency will then be able to request additional information. As a result, this section should be amended to require the applicant to provide additional information to adja-

cent landowners, and to those who have requested the information from DGC. Without such information, the public will be unable to comment effectively on the project, which contradicts the CZMA.

4. Proposed 6 AAC 50.250 makes no provision for extension of the public comment deadline when additional information is outstanding. The public comment deadline should be extended whenever the agency and coastal district deadline is extended due to need for additional information.

M. Development of a Consistency Determination

1. As currently drafted, the proposed rules restrict DGC and other reviewing agencies from considering relevant information not raised in comments during the consistency review process. 6 AAC 50.260(c). To ensure that proposed activities meet ACMP standards, DGC and other agency reviewers must be able to rely on relevant information which may not have been submitted in comments, such as scientific studies and reports, personal and traditional knowledge, and other pertinent information. Otherwise, the reviewing agency role becomes largely procedural rather than substantive.

2. Proposed 6 AAC 50.260(c) gives short shrift to the actual process whereby DGC or other reviewing agencies actually conducts a consistency review. Again, in order to ensure ACMP review is substantive rather than simply procedural, this section should lay out specific mechanisms for applying ACMP and District enforceable policies against any activity and its reasonably foreseeable effects on coastal uses and resources.

3. To empower state resource agencies and to recognize their expertise and statutory mandates, proposed 6 AAC 50. 275(c) should require all agency conditions for an activity to be included in the final ACMP authorization, regardless whether such condition speaks to an ACMP enforceable policy.

4. Proposed 6 AAC 50.270 provides no requirement for the commenting public to have the 5 day "receipt" period, and as a result, public commentators will not have sufficient time to file a petition. To correct this problem, DGC should give notice to all who commented in the same fashion that it gives notice to "review participants".

5. Under proposed 6 AAC 50.275(h) & (i), if an agency requires changes to the project as part of its delayed review, then the public and all review participants should have the same opportunity to review those changes and determine whether the project remains consistent with the ACMP. Otherwise, the agency may, as part of its permitting process, make significant changes to a project that will escape ACMP review.

N. Consistency Review Schedule & Modification

1. In order to ensure consistency with other timeline extensions in this section, and to ensure fair consideration of public comments, DGC or the reviewing agency should be authorized to extend the review timetable up to 10 days under 6 AAC 50.280(a)(6).
2. In order to ensure adequate and meaningful public participation in the ACMP process, proposed 6 AAC 50.280(b) should include public commentators on the list of reviewers who receive timely notice of modified consistency review schedules and revised timelines.

O. Federal Consistency Determinations

1. In order to comply with 15 CFR 930, 6 AAC 50.325(c)(2) should require a detailed description of the activity's reasonably foreseeable effects on coastal uses and resources, including cumulative and secondary impacts.
2. To comply with the CZMA and the ACMP, proposed 6 AAC 50.365-.395 must be modified to allow public comments on federal consistency determinations, including the right to petition and appeal any proposed or final federal consistency determination. See, e.g., 15 CFR §§ 930.2 & 930.42.

P. Federally Regulated Activities

1. To ensure consistency throughout the proposed rules, 6 AAC 50.405(a) should be modified to include activities which "may affect" coastal resources and uses, including cumulative and secondary effects on such uses and resources.
2. In order to capture the full range of possible federal activities subject to ACMP consistency review, and to comply with the language and intent of the CZMA, the phrase "but not limited to" should be inserted after the phrase "consistency review include" at the end of the first paragraph of 6 AAC 50.405(a).
3. In order to comply with the intent and language of the CZMA, 6 AAC 50.405 should be amended to require consistency reviews not only for initial federal permit, but also for any subsequent permit renewals.
4. To enhance public participation and understanding of the ACMP process, 6 AAC 50.405 should be modified to require DGC to publish, from time to time (but at least every year) a publicly available list of all federally regulated activities in the State.

Q. Public Participation

1. The ACMP requires public notice for all activities subject to consistency review. AS 46.40.096(c). While DGC may provide different forms of public notice depending on the type of activity, its effects, timing and other factors, DGC must nonetheless provide public notice for all consistency reviews. *Id.*; see also, 15 CFR § 930.2. As a result, DGC must provide public notice for all federal activities, permits and authorizations, and all state agency consistency reviews. Because DGC is required to “uniformly and *comprehensively* apply the enforceable policies of the State’s management program,” 15 CFR § 930.6, it has an affirmative duty to notify the public regarding all projects falling under ACMP rules, including many generally concurrent activities currently subject to the ABC list (see Section J for discussion on permissible scope of ABC list). Such notice may be in traditional public notice forms, or via electronic means, through email or Internet postings on the ACMP website, although the latter should be the sole means of public notice.

2. The comments discussed in Section J above provide important points to ensure fair and adequate public notice, and are incorporated herein by reference.

3. To ensure all citizens potentially affected by a coastal project or activity can participate meaningfully, DGC should be required to provide notice of the project or activity to adjacent property owners. Similarly, DGC should be required to provide notice of the suspension of review and the recommencement of review to citizens in the locally affected area. DGC has repeatedly failed to carry out its duty to notice projects and comment periods to those citizens and neighbors who have vested interests in the coastal zone impacts of projects that impact state resources. This is contrary to the ACMP FEIS and recently adopted OCRM regulations. 15 CFR 930.61 If cost is a factor, DGC can require the applicant to provide notice, similar to the process for federal projects, as set forth in the OCRM rules.

4. Proposed 6 AAC 50.520(a)(2) allows DGC to forego public hearings on the basis that it knows that it will address all of the enforceable policies that might be raised in a public hearing. It is unclear how DGC will have the knowledge of what the public would raise, and appears to supply DGC with blanket authority to deny public hearings. This section should be deleted.

5. Proposed 6 AAC 50.520(e)(3) could eliminate public comment due to factors beyond the public’s control. If the district (through no fault of the commenting public) does not receive the comment before the comment deadline, then the comment will not be considered. This section should be eliminated.

6. In order to comply with the public participation mandates of the CZMA,

public notice must ensue for emergencies and waivers identified under proposed 6 AAC 50.920.

R. Petition & Elevation

1. The current dual elevation/petition procedures deny due process, and are inconsistent with the federal approval of the ACMP. The conflict resolution procedures mandated by the federal government were intended to afford all parties equal opportunity for conflict resolution, and that conflict resolution was not to reside in the agencies, but in the Coastal Policy Council. DGC and the Legislature have deviated from the original intent of the ACMP to such a degree that citizens and citizen groups are effectively denied any participation in conflict resolution. There is no ability to participate in the elevation process afforded citizens; nor are coastal districts provided an equal vote in the conflict resolution. DGC continues to deny coastal districts a “seat at the table” in this provision, by making the coastal district participation at the discretion of the agencies. By allowing the final ACMP conflict resolution to reside in the Commissioners, DGC has deviated from the scheme established in the FEIS and specifically prohibited in that document. The petition and elevation section is contrary to the original intent of the ACMP, the due process clause of the Alaska Constitution, and to the recently-adopted OCRM regulations.

2. The “notice of petition” requirements are restrictive, in that such a petition may be denied if an “election district” is not known. Many citizens are unaware of their election district number. Furthermore, nowhere is there a requirement that a citizen be a “voting citizen.”

3. Proposed 6 AAC 50.610 regarding elevations, should, at a minimum, require the same degree of specificity regarding the identification of comments and enforceable policies that is required of the public in a petition to the CPC. See 6 AAC 50.620(d)(4). The relaxed elevation rules are further evidence of the legal shortcoming in the public’s right to participate in the ACMP process.

4. Proposed 6 AAC 50.670(b) violates due process if a quorum of the CPC is not present during the presentation of testimony, and should be corrected.

5. Emergency reviews and waiver of review are not subject to elevation or petition under proposed 6 AAC 50.920, and to satisfy the CZMA, the right to elevate and petition on this determination should not be eliminated.

S. Citizens

1. Regarding proposed 6 AAC 50.680, the terms “citizens” or “public” appear several times in the ACMP and the CZMA. For example, in enacting the ACMP legislation, the Legislature found “that the protection of the natural and scenic

resources and the fostering of wise development of the coastal area are of concern to present and future citizens of the state.” OCS SCS CSHP 342, Section 1(3). The Legislature further found that is the policy of the state to “encourage coordinated planning and decision-making in the coastal area among levels of government and citizens engaging in or affected by activities involving the coastal resources of the state” OCS SCS CSHP 342, Section 2(2). Similarly, Congress declared that it is national policy to “encourage the participation and cooperation of the public, state and local governments, and interstate and other regional agencies, as well as the Federal agencies having programs affecting the coastal zone in carrying out the purposes of (the Coastal Zone Management Act.)” CZMA § 303(3).

The CZMA identifies competing demands on lands and waters by population growth, economic development, “including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal, and harvesting of fish, shellfish and other living marine resources.” CZMA § 302(B); and further highlights the important “ecological, cultural, historic and aesthetic values in the coastal zone”. CZMA § 3032(e). Therefore, any definition of “citizen of a coastal district” must be rationally related to, and based upon, those citizens (individuals, businesses or groups) that Congress and the Legislature identified as being the intended beneficiaries of coastal zone management.

The proposed definition in 6 AAC 50.680 prevents a citizen from voicing concerns through a group, and as a result, violates due process and denies equal protection. The U.S. Supreme Court has held that effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, and the Court has acknowledge the vital relationship between freedom to associate and privacy in one’s associations. The Court further held that if revelation of the identity of a group’s members exposes the members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility, there is an adverse affect on the ability of group members to pursue their collective effort to foster beliefs which they have the right to advocate, in that it may induce members to withdraw from the group and dissuade others from joining it because of fear of exposure of their beliefs. NAACP v. Alabama 357 U.S. 449, 461-63 (1959).

Speaking out against a particular coastal district development in Alaska— particularly one that has been championed by the Governor and State agencies, and heralded as the solution to the State’s economic woes— will undeniably subject those opposed to the coastal development to public hostility, and could result in discrimination in the workplace, and discrimination based upon the racial characteristics of the citizen if that citizen is a Native Alaskan. One can imagine the reluctance of any member of a group that is taking such an unpopular position to disclose his identity in a small community. That is the

precise reason that many in Alaska choose to voice their concerns through representative groups, rather than put forth unpopular views in isolation. DGC must demonstrate a compelling state interest to restrict the definition of “citizen” to only natural persons.

Finally, the Alaska Constitution specifically reserves all wildlife and water resources to *all* persons in the State. Alaska Const., Art. VIII, § 3 (“Common Use” Clause). As a result, every person in the state has a legal interest in all wildlife and water resources in the coastal zone. It follows that the State, in exercising its public trust responsibilities, may not unduly restrict any citizen from commenting on, or from participating in the public process surrounding, any activity or project which may affect common use resources within the coastal zone.

For the reasons cited above, proposed 6 AAC 50.680 violates the U.S. and Alaska constitutions, as well as the CZMA and ACMP, and should be amended to afford broad and meaningful public participation to all people with interests in Alaska’s coastal resources.

T. ABC List

1. Proposed 6 AAC 50.710-.790 should be changed to reflect ACMP enforceable policies, including the habitat standard (see, e.g., 6 AAC 80.130). These sections discuss ACMP review for categorically, generally and individually consistent determinations, general permits and federal activities, and federally-regulated activities (i.e. the “ABC List”). ACMP enforceable policies comport with CZMA and OCRM rules and guidelines, and are part of Alaska’s approved coastal management program. As a result, DGC must carefully consider the ACMP’s enforceable policies during consistency review determinations for activities under the above-referenced sections. Yet because of the cursory review afforded specific activities under these sections, it is impossible for DGC to comply with the habitat standard, which, among other things, requires a three-part finding if coastal activities occur in sensitive habitats, including wetlands, estuaries and salmon streams. 6 AAC 80.130(c). This three part finding includes a showing that the activity presents a significant public need, there is no feasible and prudent alternative to the activity, and impacts have been mitigated to the extent feasible. *Id.* at 80.130(d).

Thus, if any coastal activity occurs in any one of the enumerated habitats, DGC or another reviewing agency must complete the three part habitat test. Yet under the proposed rules, DGC lumps a broad range of activities into generalized consistency reviews which fail to account for the unique habitats in which specific coastal projects occur. The result is that projects which affect valuable and sensitive coastal habitats receive inadequate consideration, and Alaska citizens are shut-out from participating in decisions affecting important coastal resources. As a result, the proposed rules violate the CZMA and the ACMP

because they render superfluous an important part of the State's approved coastal management program (i.e. the habitat standard). To bring the proposed rules in line with the CZMA and the ACMP, DGC needs to add language to 6 AAC 50.710-.790 which provides for individual consistency review for any coastal project which occurs in any one of the habitats enumerated in 6 AAC 80.130 and which would otherwise be subject to categorically consistent or general consistency determinations.

2. The phrase "likely to affect" in 6 AAC 50.750(a) should be changed to "may affect coastal uses and resources," to meet ACMP and CZMA standards and guidelines. DGC has apparently confused or combined the concepts of activities that "are likely to be located in" with "which may affect," as those terms are defined in the ACMP FEIS. DGC has merged these into activities "likely to affect" - a new concept in coastal zone management which appears throughout the proposed regulations. This co-mingling of concepts and phrases is inconsistent with the federally approved ACMP and constitutes a significant reduction in the scope of coastal zone management for Alaska.

3. While the proposed provisions require "notice" of the ABC list, there is no requirement for a public comment period, nor requirement that DGC consider public comments, and no opportunity to elevate or petition the decision to list a category of projects on the A or B list. There is a cross reference to 6 AAC 50.235-.270, which presumably would include public comment; however, there should be a specific reference to public comment and to the ability to elevate or petition an A or B list designation.

4. Proposed 6 AAC 50.730 conflicts with the new OCRM consistency regulations that limit general concurrences to activities which are "inconsequential", consist of "minor work," and which occur "in the same geographic area." 15 CFR 930.53(b). The A and B list activities allowed under the proposed regulations (and currently allowed by DGC) are not limited to those activities that are either inconsequential, minor or located in the same geographic region, thus establishing inconsistent federal and state standards. For example, the current ABC list allows a permanent use of water up to 100,000 gallons per day without an individual consistency review, and such activities can be conducted anywhere, whether on the North Slope or in Southeast Alaska. This is but one example, and there are many more activities in the ABC which are clearly not "inconsequential", nor occurring in the "same geographic area." As a result, in order to bring the ACMP in line with the CZMA, DGC must revise the rules surrounding the ABC list to meet congressional intent and OCRM guidance.

5. The mandatory determination in proposed 6 AAC 50.730(f) (i.e. that DGC "shall include" an activity on the B list) is an anathema to proper coastal zone management, and sets up DGC for lawsuits by applicants who will try to enforce this mandatory provision. DGC improperly deems "routine" activities as

having no coastal impacts, when in fact, routine activities may contribute significantly and cumulatively to coastal impacts to a greater degree than an individual project. For example, "routine" gravel mining and water use has had significant effect in many regions of the state, that in no way can be deemed de minimus, or inconsequential. The cumulative impacts definition in this section is inappropriate (see discussion in Section A above).

6. Proposed 6 AAC 50.750(d) appears to refer to the "general consistency determination" section, but could be read to allow other activities to be exempted from ACMP review. A cross reference should be included to clarify.

U. Project Modifications & Renewals

1. In order to promote consistency throughout the rules, and to comply with CZMA and ACMP, proposed 6 AAC 50.810(b) should replace the phrase "will likely cause" with the term "may affect." Furthermore, as currently written, the rules unduly restrict ACMP review for modifications to only those projects or activities which require new or changed agency authorizations. See 6 AAC 50.50.810(b)(1) & (2). This constricted view contravenes the CZMA, and as a result, this section should be amended to include ACMP reviews for any project or activity which may result in different effects to coastal resources and uses than those previously reviewed in the original consistency review, or when technological advances demonstrate improved pollution reduction or habitat protection capacities. Such standards should include changes in environmental, natural resource and technological factors, including but not limited to changes in receiving water quality, air quality, wildlife population demographics and technology advances. Furthermore, in order to comply with the CZMA and ACMP, DGC must make a finding that any modification is warranted in light of cumulative impacts from past, proposed or reasonably foreseeable coastal impacts in the area of the project or activity. Proposed 6 AAC 50.810(f) & (g) should also be amended to incorporate these standards.

2. Proposed 6 AAC 50.820(a) casts a sweeping and standard-less exemption over permit renewals and other regular agency reauthorizations which would have the effect of restricting ACMP review only to new or substantially modified projects without considering changes to the environment, natural resources or technology. In order to comply with the CZMA, this section must be amended to require full ACMP review in situations where any element of the project (which is up for a renewal or reauthorization) may result in different effects to coastal resources and uses than those previously reviewed in the original consistency review, or when technological advances demonstrate improved pollution reduction or habitat protection capacities. Such standards should include changes in environmental, natural resource and technological factors, including but not limited to changes in receiving water quality, air quality, wildlife population demographics and technology advances. Furthermore, in order to

comply with the CZMA and ACMP, DGC must make a finding that any renewal or reauthorization is warranted in light of cumulative impacts from past, proposed or reasonably foreseeable coastal impacts in the area of the project or activity.

V. Federal Assistance to State & Local Governments

1. Pursuant to 15 CFR Subpart F, state and local applicants for federal assistance (including contracts, grants, loans, subsidies, insurance, etc., see 15 CFR § 930.91) which may effect any coastal use or resource must submit an application for such assistance to DGC for consistency review. The proposed rules should be amended to address the federal rules.

III. Conclusion

Thank you for your attention to this important matter. We appreciate the opportunity to comment, and we look forward to your timely response. If you have any questions regarding these comments, please contact Bob Shavelson (907-235-4068).

Very truly yours,

Bob Shavelson
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On behalf of the following groups & individuals:

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